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No. 83-1242

In the Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON AND TAKERU KAMIYAMA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly denied petitioners' request for a bench trial.

2. Whether the district court's instructions to the jury were consistent with the Religion Clauses of the First Amendment.

3. Whether under the Due Process Clause, legal uncertainty, if any, regarding the correctness of the district court's instructions on the creation of a charitable trust precluded prosecution of petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-74) is reported at 718 F.2d 1210. The district court judgments of conviction are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1983. Petitions for rehearing were denied on October 28, 1983, and November 1, 1983. On November 22, 1983, Justice Marshall extended the time within which to file a joint petition for a writ of certiorari to and including January 26, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of various charges in connection with the filing of false income tax returns for petitioner Moon in the years 1973, 1974, and 1975, and the preparation and presentation of fabricated documents in support of the

returns. The 13-count indictment charged both petitioners, under 18 U.S.C. 371, with conspiring to defraud the United States by impeding and obstructing the Internal Revenue Service in the computation, assessment and collection of income taxes due and owing from petitioner Moon, as well as with conspiring to make and subscribe false federal income tax returns, in violation of 26 U.S.C. 7206, to obstruct justice, in violation of 18 U.S.C. 1503, to make false statements to government agencies, in violation of 18 U.S.C. 1001, and to make false statements to the grand jury, in violation of 18 U.S.C. 1623. Petitioner Moon was also charged in three substantive counts with filing false personal federal income tax returns for the years 1973, 1974, and 1975, in violation of 26 U.S.C. 7206(1). Petitioner Kamiyama was also charged with aiding in the filing and preparation of Moon's false tax returns for the years 1974 and 1975, in violation of 26 U.S.C. 7206(2), obstruction of justice through the submission of false documents to the grand jury, in violation of 18 U.S.C. 1503, submission of false documents to the Department of Justice, in violation of 18 U.S.C. 1001, and perjury, in violation of 18 U.S.C. 1623. A separate indictment charged Kamiyama with an additional count of perjury. Pet. App. 4-5.

Petitioners attempted to waive their right to a trial by jury in favor of a bench trial, but the government withheld its consent pursuant to Fed. R. Crim. P. 23(a). After voir dire, the district court rejected petitioners' motions for bench trial, finding the impanelled jury capable of rendering an impartial verdict (Tr. 1751-1761). Upon trial, petitioners were found guilty on all counts. Petitioner Moon was sentenced to four concurrent terms of 18 months' imprisonment and fined $25,000 plus costs. Pet. App. 5. Petitioner Kamiyama was sentenced to seven concurrent terms of six months' imprisonment and fined $5,000 (*ibid.*).

1. The court of appeals affirmed the convictions with the exception of petitioner Kamiyama's conviction for obstruction of justice (Pet. App. 4, 49-51). The court

unanimously rejected petitioners' claims, inter alia, that the prosecution was impermissibly motivated by hostility toward petitioner's religion (*id.* at 33-37), that the trial by jury violated their due process rights (*id.* at 6-11), that the evidence was insufficient to support conviction (*id.* at 11-21), and that the jury instruction violated the Religion Clauses (*id.* at 28-32). On a divided vote, the court rejected petitioners' contention that the instructions on the creation of a charitable trust conflicted with applicable New York trust law (*id.* at 22-28). The court concluded that no such instruction had been required under the facts of the case (*id.* at 22-25) and, as a separate alternative holding, that the instructions as given were correct (*id.* at 25-28).

2. Petitioner Moon is the founder and leader of the Unification Church, incorporated in the United States in 1961 as the Holy Spirit Association for the Unification of World Christianity (HSA-UWC) (Pet. 2; Pet. App. 13). He is also a successful businessman; at the time of his initial visit to the United States in 1972 he was founder and chairman of the board of eight Korean publishing and manufacturing companies (Pet. App. 11; GX 570).

The principal issue at trial concerned ownership of bank accounts in the Chase Manhattan Bank and stock in a corporation, Tong Il Enterprises, Inc. The government contended that the funds and the stock were petitioner Moon's personal property, while petitioners contended that Moon held them for the "international Unification Church Movement"—an entity whose very existence the government questioned—as a nominee, agent, or trustee. The evidence at trial, which must be viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), may be summarized as follows.

a. *The Tong Il stock.* In June 1973, petitioner Kamiyama incorporated Tong Il Enterprises, a firm that purchased and imported ginseng tea and marble vases (Pet. App. 11-12; GX 401A). Petitioner Moon and his wife

received 70% of the corporation's stock; petitioner Kamiyama received 10% (Pet. App. 12). Although originally he had agreed to pay for his shares, petitioner Moon did not do so; but various assets were transferred to Tong Il by other corporations that Moon controlled (*ibid.*). As the court of appeals observed (*id.* at 14 n.2), "[t]he jury could well have found that the whole transaction amounted to an indirect dividend to Moon from the companies under his control." Petitioner Moon did not report income attributable to the stock distribution (*id.* at 13-14). There was no other evidence regarding the source of the shares, and no evidence at all suggesting that the Unification Church viewed itself at the time as the beneficial owner of the shares held in petitioner Moon's name. Indeed, an official of the church organization, HSA-UWC, told lawyers for that organization that HSA-UWC had no connection with Tong Il other than as a purchaser of ginseng tea (GX 456).

b. *The Chase Manhattan bank accounts.* On March 27, 1973, petitioner Moon walked into the Chase Manhattan Bank's international office in New York City and opened a personal checking account and a personal savings account in his name (Tr. 2241-2267). The initial checking account deposit was of three checks totalling $82,400, made out to Sun Myung Moon (GXs 4A, 4B, 4C). Although petitioner Moon identified himself to the Bank as the founder of HSA-UWC (GX 2), he did not mention the "international Unification Church Movement," in whose beneficial interest he now claims to have opened the account, or otherwise indicate that the account was not his personally (Tr. 2302). Had he done so, the Bank would have required the name on the account (Tr. 2303).

By the end of 1975, more than $1.7 million had been deposited in these accounts. All but $200,000 of the deposits were in cash. Pet. App. 5; GX 2006. A substantial portion of these funds was transferred to high-yield Chase time deposits in petitioner Moon's name (Pet. App. 5; GX 2005). From 1973 through 1975, these investments earned more than $100,000 in interest, which was

not reported on Moon's tax returns for the prosecution years (Pet. App. 5; GX 2018). It is undisputed that the funds were held in petitioner Moon's name, and evidence showed, in the trial court's words (S. 13), "that he treated the entire sum of money as his and used it for whatever purposes he wanted to, some personal and some more business-related, and that all of it was treated by him as being his own." The defense theory, however, was that it could be inferred from the source of the funds that they were actually held in trust for the international Unification Church Movement.

The actual source of most of the funds (and, accordingly, their intended use) was and remains unknown, as the government demonstrated at trial (see S. 16; Tr. 6222). The evidence indicated both that there were alternative sources of the funds—petitioner Moon's international and domestic business activities—and that Unification Church members had a "custom of providing gifts of substantial value" to petitioner Moon "personally" (GX 456B, at E1881). As described more fully below, petitioners created documents purporting to show that the funds in question were derived from foreign Unification Church loans and donations. The government conclusively showed these documents to be fabrications. Three witnesses, members of the Unification Church whose testimony was seriously impeached,[1] testified that they gave sums totalling $172,000 (out of a total of about $1.7

[1] Two of the witnesses, for example, were shown to be participants in the manufacture of the phony Japanese Family Fund ledger (Yukiko Matsumura) and the backdated "loan agreements" from foreign Unification Churches (Paul Werner). See pages 11-13, *infra*. Moreover, the testimony of the witnesses was in fact contradictory to the defense theory that the funds were intended to be used for nonspecific Church purposes at the discretion of petitioner Moon; both Marion Porter (alleged donor of $37,400) and Paul Werner (alleged donor of $135,000) stated that the funds were raised to support a series of speaking tours then being undertaken by petitioner Moon (Tr. 3124, 3405-3406). Instead of being used for that purpose, the funds were deposited to personal accounts held in petitioner Moon's name.

million in the accounts) to petitioner Moon, intending them as a donation to their church. They did not state that they communicated any such intention to petitioner Moon.[2]

The only evidence concerning the view of petitioners and Unification Church officials *at the time of the events in question* on the ownership of the funds were various statements that the funds were petitioner Moon's own.

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[2] We thus feel constrained to point out that petitioners' assertion in their statement of facts (Pet. 6 (footnote omitted)) that "[t]he government did not overtly dispute, as it could not, * * * that the assets had been given him by followers of his religion, who did so intending that the assets be used for that religion" (see also, to similar effect, Pet. 7 n.12), is not the case. See Tr. 6222-6224 (government's summation to the jury); Gov't C.A. Br. 8-9, 94. The government frankly does not *know* where the funds came from, but is disinclined to accept the explanation that petitioners' fabricated documents and perjured grand jury testimony purported to establish. Similarly, the court of appeals did not "conced[e]," as petitioners assert (Pet. 19), "that Unification Church members had given the assets to Reverend Moon 'intending [them] as a donation to their church'" (quoting, out of context, Pet. App. 23). See also Pet. 6 n.9. What the court said (Pet. App. 23 (emphasis added)) was:

> In order to establish the defense of trusteeship, defendants would have had to produce evidence of the donors' intent to create a trust. Yet *the only evidence even remotely touching on this issue was* the testimony of Church members Matsumura and Porter and German Unification Church leader Werner who simply stated that they gave money to Moon, intending it as a donation to their church.

For purposes of appellate review, a convicted defendant is not entitled to treat as established fact a proposition contested by the government and supported only by a few interested witnesses whose testimony was evidently not believed by the jury. Yet in addition to suggesting that the government and the court of appeals concede the truth of their dubious view of the facts, petitioners repeatedly refer in their Petition to the alleged gifts by church members for religious purposes, without acknowledging that no such facts have been established. See Pet. 6, 7 n.12, 17 & n.29, 18, 19-20, 23, 25; but cf. *id.* at 5, 8, 20 n.34 (acknowledging, at least implicitly, that the source and intended use of the funds were controverted "claim[s]" or "proposition[s]" of the defense).

His banking transactions were invariably accompanied by written authorizations signed by himself, referring to the accounts in personal terms, such as "my account," "my money," and "my Time Deposit" (see, *e.g.*, GXs 89, 100, 110, 111, 113, 116, 118, 120, 123, 143, 146, 150, 158, 161, 182F, 186, 230, 234, 236, 251, 252, 263, 264, 273, 276, 277, 278, 282). Although informed by accountants that if he held funds in his name on behalf of someone else he should file IRS Form 1087, petitioner Moon did not do so (Tr. 4190-4191; see *id.* at 6666-6667). Evidence showed that in discussions with lawyers and accountants in January 1974, Unification Church officials described the funds at issue as petitioner Moon's personal property, totally separate from Church property. See pages 10-11, *infra*. Moreover, on several occasions when a Unification Church official proposed using the Chase funds for various important Church projects, Kamiyama told him that the funds were "Father's money" and that they were "not accessible" (Tr. 5185-5186).

In October 1973, HSA-UWC, the Church corporation, purchased a 26-acre estate (East Garden) for petitioner Moon's use as a home for himself, his family, and his staff (Pet. App. 13, 15; Tr. 3017). Petitioner Moon provided the church corporation $361,827 from the disputed checking account at Chase to complete the cash purchase of the estate for $631,827 (Tr. 2863-2866; GXs 76, 76B, 76C, 444, 445).[3] HSA-UWC issued a promissory note for $361,827, signed by Neil Salonen, Acting President, and made out to the order of "Reverend Sun Myung Moon" (GX 445). This transfer of funds was carried on the Church corporation's books as a personal loan to the Church from Moon (Pet. App. 15; Tr. 5842-5844; GX 500).[4] Later, when HSA-UWC was unable to

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[3] Petitioner Moon also issued a check for $51,160 to pay for furnishings in the estate (Pet. App. 13).

[4] A financial and legal official of HSA-UWC later prepared a list of all loans outstanding from petitioner Moon to HSA-UWC, in-

meet mortgage payments on a $500,000 mortgage on another Church property, known as "Belvedere," Moon broke a Chase time deposit and lent $175,000 to the organization (Pet. App. 15; GX 86). HSA-UWC repaid petitioner Moon $70,000 of this loan and wrote off the $105,000 balance as a "special contribution[]" from Moon (GX 513, at E1983; see Pet. App. 15; GX 511).[5]

In November 1973, petitioner Moon directed that title to East Garden be transferred to him. The HSA-UWC president explained to another Church official that "Father wanted East Gardens transferred into his own name because it was his personal money" (Tr. 2870-2872; see Pet. App. 15). However, before the transfer could be completed, HSA-UWC lawyers informed petitioner Moon's subordinates that a simple transfer would result in substantial personal tax liability to Moon because the value of the estate transferred would be personal income to him. The transfer would also, according to the lawyers, jeopardize HSA-UWC's tax exempt status. To avoid these consequences, petitioner Moon would have to pay the estate's fair market value of $700,000 to HSA-UWC. Petitioner Moon's loans to HSA-UWC were then falsely increased on the church organization's books to $700,000, and Moon signed a Release and Cancellation of Indebtedness Agreement covering the $700,000 purchase price for East Garden (Pet. App. 15; GXs 471, 472). After the deed to East Garden had been executed, but before it was filed, the transaction was reversed on advice of counsel and the documents ordered destroyed (GXs 436, 475). The court of appeals observed that petitioner Moon, by signing the false release and cancellation of indebtedness, "implicitly acknowledged that the

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cluding those in connection with East Garden (GX 478). The list was prepared for petitioner Kamiyama, expressly for use "in the handling of Father's *personal* records" (GX 478, at E1940 (emphasis added)).

[5] HSA-UWC accountants considered treating petitioner Moon's contribution as a transfer from "an associated entity," but decided instead that it was properly treated as a "contribution" (GX 638A).

$361,827 used to pay for the property * * * was his own" (Pet. App. 15-16, 20); if petitioner Moon had simply been acting on behalf of a related Church entity, rather than himself personally, the transfer could have been accomplished without any personal tax consequences whatsoever.

The government introduced evidence of a number of business and personal transactions engaged in by petitioner Moon with the disputed funds.[6] The purpose of this evidence was not to show that the uses of the funds were not "religious" in nature—a church can legitimately engage in business transactions—but that the transactions were personal to petitioner Moon. In none of the transactions did any contemporaneous document or other credible evidence suggest that petitioner Moon was acting on behalf of an "international Unification Church Movement," or indeed, on behalf of any one other than himself.[7]

The very existence of an "international Unification Church Movement" was an issue at trial. Petitioners contended (Tr. 5432, 5513-5515, 6304; see Defendant Moon's Proposed Instruction No. 15, at C.A. App. 1365) that the "international Unification Church Movement" was an unincorporated association, the predecessor entity to the "Unification Church International." The latter, in-

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[6] For example, in September 1975 petitioners Moon and Kamiyama obtained $155,000 from one of Moon's time deposits at Chase for purchase of stock in Diplomat National Bank in Washington, D.C., in the names of Moon and Kamiyama (Pet. App. 14-15; Tr. 3498). After the IRS investigation began, petitioner Moon redeemed his shares (Tr. 3509-3511; GX 556). The defense conceded at trial that these shares were "a personal investment" for petitioner Moon, but contended, without evidentiary support, that the money used was a loan to petitioner Moon from the international Unification Church Movement (Tr. 6335-6336, 6345).

[7] Two defense witnesses, senior Unification Church officials, stated the opinion that two particular business ventures were entered on behalf of the Church (Tr. 5658 (Choi), 5818-5819 (Kim)). However, both witnesses admitted that they had no personal knowledge of the Chase accounts or the financing of the transactions (Tr. 5664-5666 (Choi), 5787, 5806 (Kim)).

corporated in 1977, is a *taxable* entity that holds Church business properties. See Tr. 4649-4652, 5939. The government contended that the "international Unification Church Movement" never existed as an entity, but was created after the fact to justify petitioner Moon's failure to pay taxes on personal income (Tr. 6488-6492). During the period from early 1973 to early 1974, petitioners and the Unification Church set up a number of church organizations. Each was separately incorporated, and had its own bank account or accounts in its own name. See, *e.g.*, Tr. 5792-5798; GX 972. Thus, in addition to a total absence of any direct contemporaneous evidence that the "international Unification Church Movement" existed as an entity, the government showed that such an amorphous financial and organizational arrangement would have been inconsistent with Unification Church practice.

In an intensive two-day meeting in January 1974, leaders of HSA-UWC, including its President, Neil Salonen, consulted a Washington law firm and an accounting firm about a number of business and financial matters, including the loans from Moon for the purchase of East Garden and the intended transfer of East Garden to Moon (Pet. App. 16; GXs 454A, 456B). The discussions concerned a wide array of Unification Church entities, both incorporated and unincorporated. No mention of an "international Unification Church Movement" was made, and the obvious premise of the legal advice sought was that the funds in question belonged to petitioner Moon personally. Memoranda and letters prepared by counsel on the basis of the information provided at the meeting by the Church leaders were introduced into evidence in redacted form as proof of the contemporaneous understanding of the Unification Church concerning petitioner Moon's finances and the funds in question. In a letter to Salonen dated January 11, 1974, counsel advised (GX 454A, at E1845):

> It is important to stress what may be obvious: to the extent that Rev. Moon has separate assets

> which are to be maintained as such, it is vital to maintain that separateness in all respects. Therefore, if the Church borrowed funds from Rev. Moon, or vice versa, for the purchase of one of the properties, that amount should be repaid. Furthermore, such transactions between the Church and Rev. Moon should be avoided in the future.

A memorandum summarizing the meeting makes it even clearer that in his treatment of the Chase funds and the East Garden transaction, petitioner was acting as an individual, not as an agent or trustee for the Church (GX 456B, at E1881):

> We discussed the affairs of Rev. Moon and his and their relationship to the Church because Rev. Moon has monies of his own having no relationship with HSA-UWC and those monies are involved in the purchase of property which might be used in Church activities. * * *
>
> If title to the East Garden property is to be transferred to Rev. Moon, there would have to be an accounting and repayment to the Church of any monies which it advanced toward the purchase price. Otherwise, there would be a diversion of tax exempt funds for private gain.

The memorandum also revealed that Unification Church members had made substantial gifts to petitioner Moon personally (*id.* at E1881-E1882):

> We suggested also the termination of the custom of providing gifts of substantial value to Rev. Moon on various occasions, in kind or in cash. To the extent that members cannot be dissuaded from making gifts to Rev. Moon, then Rev. Moon should indicate that he wishes the gift to be made to HSA-UWC in his honor rather than to himself personally.

c. *The false documents and returns.* Soon after this meeting, petitioner Kamiyama was put in charge of the preparation of petitioner Moon's tax returns under Moon's own direction (Pet. App. 16; GX 463A). Any reference in the evidence at trial to the "international

Unification Church Movement" as beneficial owner of the funds, or to petitioner Moon as agent, nominee, or trustee, originated after this point (see Tr. 3863, 3866, 4182-4186, 4186, 4189-4190). During this period, records were created to account for the more than $1.7 million deposited into the Chase accounts and to create the impression that these funds were Church assets (Pet. App. 16).[8] Three hundred and fifty thousand dollars was accounted for as loans from Unification Church organizations in Europe, and $1.2 million was accounted for as funds purportedly brought to the United States in amounts of $3000 to $4000 by Japanese Unification Church members (*id.* at 16-17). These latter amounts were included in a ledger called the "Japanese Family Fund Ledger" (*id.* at 17). The loan agreements and this ledger were manufactured after the fact; the ledger was created after the IRS investigation had begun, by a Kamiyama aide, Yukiko Matsumura, who worked backwards from Moon's bank statements and deposit slips and created fictitious sources to account for the deposits (*id.* at 17-18).[9] The petitioners later gave these documents to the Justice Department, claiming that they were contemporaneous documentary evidence that petitioner Moon held the Chase funds and the Tong Il stock as an agent, nominee, or trustee of the Unification Church (*id.* at 16).

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[8] The evidence of the document fabrications and their use by petitioners to mislead their own accountants and lawyers, the IRS, the Department of Justice, and the grand jury is so extensive and occupies such a large part of the 15 volumes of exhibits and transcripts in the printed record, that we have not provided specific citations to record evidence. The government's brief in the court of appeals contains a detailed summary. See Gov't Br. 25-43.

[9] Petitioners refer discreetly to these manufactured documents as having been merely "backdated" (Pet. 7 n.12) and complain that the government used these documents before the jury to "insinuate[]" (Pet. 7) that "Reverend Moon had simply made, after the fact, the explanation that the assets were owned by his church movement." That, of course, was the government's theory of the case, strongly supported by the evidence, which was apparently credited by the jury.

The government introduced evidence of numerous false and conflicting statements and explanations, mostly based upon these fabricated documents, made by petitioners to their accountants and lawyers, the IRS, the Department of Justice, and the grand jury. This evidence of deliberate misstatements of fact and manufacture of phony documents formed the core of the government's case that the false statements in petitioner Moon's tax returns were willful, as well as for the related charges of perjury and submission of false documents. See Pet. App. 11-21.

ARGUMENT

1. Petitioners contend (Pet. App. 11-17) that the district court erred in rejecting their attempt to waive a jury trial and be tried by the judge sitting alone. The general principle that a criminal defendant is not entitled to insist upon a bench trial over the prosecution's objection is well settled, and indeed flows naturally from the provision of Section 2 of Article III that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." Petitioners' claim that they come within a possible exception to this principle raises an infrequently litigated issue that has produced no division of opinion among the circuits, is not well rooted in the specific facts of this case, and does not warrant review by this Court.

a. Denial of petitioners' attempted waiver of a jury trial was in full accord with Fed. R. Crim. P. 23(a), which provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." See *Singer* v. *United States*, 380 U.S. 24 (1965); *United States* v. *Houghton*, 554 F.2d 1219, 1226 (1st Cir.), cert. denied, 434 U.S. 851 (1977); *United States* v. *Wright*, 491 F.2d 942, 945 (6th Cir.), cert. denied, 419 U.S. 862 (1974); *United States* v. *Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972), cert. denied, 410 U.S. 912 (1973); *United States* v. *Ceja*, 451 F.2d 399 (1st Cir. 1971); *United States* v. *Abrams*, 357 F.2d 589, 549-550 (2d Cir. 1966). "A de-

fendant's only constitutional right concerning the method of trial is to an impartial trial by jury." *Singer*, 380 U.S. at 36.

Petitioners rely on the following dictum in *Singer*, 380 U.S. at 37-38 (citation deleted):

> We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" or some other factor may render impossible or unlikely an impartial trial by jury. However, * * * this is not such a case, and petitioner does not claim that it is.

Petitioners assert that public hostility toward Reverend Moon constituted the kind of compelling circumstance referred to in *Singer*.

As the court of appeals correctly recognized (Pet. App. 9-10), the validity of a claim that a fair trial cannot be had because of public hostility can be resolved definitively only upon a voir dire of prospective jurors. Here, at the conclusion of a seven-day voir dire (Tr. 1-2121), the district court expressly rejected petitioners' claims that a fair and unbiased jury could not be, and had not been, selected (Tr. 1751-1761). The court stated (Tr. 1759):

> I have reasonable faith in the lack of bias in this jury. * * * I think that we have gotten a jury which is, if not totally free from bias, by and large capable of putting aside the bias they have and deciding the case on the merits of the charges.

After the trial, the court was even more emphatic in once again rejecting the petitioners' view of the jury. At the same time, the court, citing *Singer*, indicated that it would have ordered a bench trial had it in fact found pervasive bias against petitioners (S. 26):

> If we had gotten to a position in the jury selection where I did not believe that we had a pool of unbiased jurors, I would have exercised almost unprecedented discretion of saying you would have to go without a jury. But I became convinced by the time we got to a pool of about 36 that a jury could be selected that would be sufficiently unbiased, and there is nothing more you can say in that regard that is going to change my view on it.

As the court of appeals unanimously determined (Pet. App. 10), these findings were amply supported by the record of the extensive voir dire undertaken by the trial court and were in accord with the settled principle that a juror is considered sufficiently impartial if he can set aside any opinions he holds and render a verdict based on the evidence in the case. *Murphy* v. *Florida*, 421 U.S. 794, 798-800 (1975); *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961).[10] The findings of two courts, both of them citing the *Singer* standard, that the jury was fair and impartial need not be reviewed by this Court.

b. Petitioners contend (Pet. 14), however, that a defendant should be entitled to a bench trial whenever the trial judge indicates that such a trial would be "fairer" than a jury trial and the prosecution does not make an adequate showing to the contrary. No such finding was made by the district court.[11] But even if the court had

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[10] Petitioners were granted 20 peremptory challenges—twice the usual number. Approximately 20 jurors were excused for bias, and only six or eight of petitioners' challenges for cause were denied by the trial court. Tr. 1752-1753. And, as the court of appeals noted (Pet. App. 10), defense counsel challenged only one of the 12 actual jurors for cause, and did not raise the denial of that challenge on appeal. See *Beck* v. *Washington*, 369 U.S. 541, 557-558 (1962) (failure to challenge prospective jurors for cause is strong evidence defendant considered jurors not biased). Any requirement that a defendant's objections to prospective jurors be accorded particular consideration when he has attempted to waive jury trial (Pet. 12 n.17) was satisfied by the trial court's liberal grant of peremptory challenges and challenges for cause.

[11] Contrary to petitioners' claims (Pet. 14), the district judge did not actually determine in any formal sense that a bench trial would

made such a finding, petitioners' conclusion could not be squared with *Singer*. Under *Singer*, a bench trial may be required not where it would be "fairer," but where "the Government's insistence on trial by jury would result in the denial to a defendant of an *impartial trial*." 380 U.S. at 37 (emphasis added). Petitioners' view would eliminate the government's right under Rule 23 (a) to insist upon a jury trial; the government's "consent" would be reduced to the right to argue to the trial judge that he would not be "fairer" than a jury. There is no precedent for such a conclusion, and neither Rule 23(a) nor anything in the Constitution requires it.

c. Petitioners also contend (Pet. 14-15) that a reason given by the government for withholding consent to a bench trial violated their First Amendment right to free speech. This contention lacks merit.

The government's position on jury trial was set forth in a letter to the district judge dated March 11, 1982 (C.A. App. 811-812).[12] One of the reasons for the government's objection to petitioners' request was the "overriding public interest in the appearance as well as the fact of a fair trial" (C.A. App. 812). The government referred to various public statements of petitioner Moon and his supporters charging that this prosecution was motivated by "religious persecution and racial bigotry" (C.A. App. 811) and noted that the Constitution seeks to

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be "fairer" than a jury trial. It is true that the judge commented at one point: "I would have thought it fairer to have this case tried without a jury" (Tr. 1760) and "[b]ut I do think I would feel better about the fairness from the position of the defendants had they been granted a non-jury trial" (Tr. 1761). However, he later made it clear that those statements were informal remarks and not "findings." During a post-trial hearing the judge stated to defense counsel (S. 40-41): "Keep in mind I did not say it would be fairer not to have a jury but it would be better. * * * * * You are putting into my mouth words that were put forward as debate and not as finding."

[12] The government is not required to provide a reason for refusing to consent to a bench trial. *Singer*, 380 U.S. at 37.

defuse such "attempt[s] to create a public atmosphere of distrust for our system" by assigning primary responsibility for deciding controversial criminal cases to a jury drawn from the lay community (C.A. App. 812).

The government's concern was legitimate. It has long been recognized that it is vital to our system of justice not only that justice be done, but that it appear to be done. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 606 (1982); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring). Since the jury is "the tribunal which the Constitution regards as most likely to produce a fair result" (*Singer*, 380 U.S. at 36), the government had reason to believe the public would better accept the results of a jury trial. But even if this belief was wrong, it is difficult to understand petitioners' contention (Pet. 14 n.21) that the government's refusal to consent to a bench trial should be regarded as "penalizing" their expressions of criticism. After all, as this Court observed in *Singer*, the effect is "simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him" (380 U.S. at 36).

2. Petitioners contend (Pet. 17-22) that jury instructions given by the district court and approved by the court of appeals violated the Religion Clauses of the First Amendment.[18] They claim (Pet. 17) that the jurors were "licens[ed] * * * to substitute their lay allocation of church property and authority for that of the church." The general principles invoked by petitioners are central to this nation's heritage of religious liberty and must be protected; their charge that those principles were violated in this case is, however, entirely without foundation.

Petitioners concede, at least in this Court, that petitioner Moon's finances must be viewed as separate and

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[18] Although the Petition does not so state, we assume that the second and third questions presented by petitioners have no bearing on petitioner Kamiyama's convictions for perjury and submission of false documents.

distinct from those of the Unification Church (Pet. 20-21 n.34). It seems obvious—and we think it is undisputed —that the jury must therefore be "licensed" to decide whether funds held in petitioner Moon's name were held for his personal use or for church purposes. And it would seem just as obvious that the jury is not required to "defer" (Pet. 22) to statements by petitioners and other Church officials concerning who owned particular property. The jurors are entitled to disbelieve the defendants' version of the facts; and in this case they did.[14] It should not be forgotten that all of the contemporaneous evidence before the jury showed that petitioners and other Unification Church leaders treated the funds as, and understood them to be, the personal property of petitioner Moon, and that there were powerful reasons to doubt the credibility of the few witnesses who testified, after the fact, to the contrary.[15] Thus, there was ample basis for the jury to decide against petitioners on the controlling factual issues. See Pet. App. 11-23. Since petitioners rely on a *contrary* set of factual assumptions (see note 2, *supra*) as the predicate for their constitutional arguments, we submit that their second and third questions presented are not properly raised on this record.

Moreover, although the second and third questions petitioners ask this Court to review relate to the trial court's jury instructions, petitioners did not, with one minor exception,[16] raise their arguments in a timely

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[14] Petitioners hint darkly (Pet. 7) that the government "cut off" the presentation of evidence by the defense by "obtaining rulings of inadmissibility" and "issuing threats" concerning rebuttal evidence. Petitioners do not raise these allegations as issues for this Court's review, and it is therefore appropriate to assume (as we believe to be the case) that petitioners had a full and fair opportunity to introduce all relevant evidence in their own defense.

[15] Petitioners themselves did not testify at trial. Moreover, the entire testimony that the funds had been intended as donations to the Church—even if believed—accounted for only about ten percent of the Chase Manhattan funds.

[16] Petitioners objected to the district court's instruction regarding proof of the existence of the "International Unification Church

fashion in trial court or properly preserve them for appeal. See Fed. R. Crim. P. 30; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

In any event, the court of appeals unanimously rejected petitioners' claim that the jury instructions were in violation of the First Amendment.[17] We believe that petitioners' specific criticisms of the instructions reflect nothing more than a misunderstanding of them and do not raise legal issues warranting review by this Court.[18]

Petitioners claim that under the instructions the jury could reject the defendants' explanation that petitioner Moon held the funds in trust for the Church "if," in petitioners' words, "the jury thought it *more suitable* for church assets to be entrusted to one of the church's incorporated worldly branches than to the church's leader" (Pet. 21 (emphasis added)). This is simply not an accurate reading of the instruction. The jurors were not charged with deciding how petitioners and the Unification Church *should have* organized their affairs, but only with deciding how they actually *did* organize them. Petitioners quote nothing, and we can find nothing, in the instructions to support their reading.

Petitioners assert (Pet. 19) that "the court of appeals effectively licensed the jury to reject church beliefs on

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Movement" as an unincorporated association, properly preserving the issue for appeal (Tr. 6660-6661). Even so, the argument at trial bears little resemblance to petitioners' argument here. Compare Tr. 6660-6661 with Pet. 21-22.

Petitioners intially attempted to "except generally" to the jury instruction "insofar as it does not specifically adopt the language of [their] requests" (Tr. 6658), but the district court correctly advised them that they could not "do it that way" (*ibid.*). Petitioners had submitted a lengthy proposed instruction on trust law (Defendant Moon's Proposed Instruction No. 16, at C.A. App. 1369), but defense counsel subsequently made no specific objection to the court's instructions on that subject as proposed or given.

[17] Judge Oakes' dissent went solely to issues of New York trust law.

[18] The relevant instruction is quoted in full at Pet. App. 67-69 n.3, and is found at Tr. 6583-6588.

religious matters" by "expressly holding the jury 'not bound to accept' church members' views of what uses of the assets were 'religious.' " But petitioners at trial neither presented evidence of Unification Church doctrine on "religious uses" of assets nor requested a jury instruction concerning the weight to be given the Church's definition of religious use. The jury instructions referred only to the *defense theory* that the funds "were held in trust by Moon for the International Unification Church Movement and used for *church purposes*" (Pet. App. 67-68 n.3 (emphasis added)).[19] The term "church purposes" was proposed by petitioners themselves for use in the instructions on this point (Defendant Moon's Proposed Instruction No. 16, at J.A. 1371-1372; see also Tr. 6340 (defense summation)), and fairly captures the distinction between personal funds and funds held for institutional—or "church"—purposes.[20] The jury was not asked to decide whether expenditures actually made by a church were for "religious purposes." Rather, in the absence of any direct evidence that a trust relationship, whether express or implied, had been created, the jury was properly invited by both defense and prosecution to treat petitioner Moon's uses of the funds as evidence of whether he and the Unification Church regarded the funds at the time as the property of the international Unification Church Movement, or of Moon personally. Resolution of this question required the jury neither to accept nor to reject—nor to undertake any inquiry concerning—the religious beliefs or mission of the Unification Church.

Indeed, however religious the motivation or purpose of the Church donors (if Church donors were the source of the funds) may have been, the interest on the funds

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[19] That the court of appeals used the term "religious use or purpose" in this context (Pet. App. 30) does not affect the propriety of the jury instruction.

[20] The trial court expressly instructed the jury that religious organizations can legitimately invest and conduct businesses, and can pay the living expenses of their leaders. Pet. App. 69 n.3.

could still have been taxable income to petitioner Moon. Devoted believers have been known to make personal gifts to religious leaders. Evidence showed that Church members had the "custom of providing gifts of substantial value" to petitioner Moon "personally" (GX 456B, at E1881). Interest on personal gifts to Moon—as opposed to the Church—would be taxable to him quite without regard to any questions of religious doctrine.

Petitioners also claim that the jury instructions "invited the jury to draw adverse inferences from the way in which the international Unification Church chose to organize itself" (Pet. 21), apparently because the jury was instructed to consider, among other factors, "whether the Movement had a specific organizational structure, written charter or constitution" (Pet. App. 68 n.3), "the existence of other Unification Church corporate entities during the relevant time period" (*ibid.*), "the fact that the accounts were maintained under Reverend Moon's name" (*ibid.*), and the "manner in which the stock and funds were administered" (*ibid.*).[21] Petitioners assert (Pet. 21 n.35) that this instruction "permitt[ed] the jury to penalize the accused" because of the organizational choices of the Church.

Petitioners gravely misapprehend the question. A church is free to organize itself as it sees fit, but the First Amendment does not preclude a factfinder from determining how a church *has* organized itself and drawing appropriate factual inferences from that structure. Tax consequences may (and often do) flow from a church's organizational decisions. Here, petitioners have put forward a defense that is totally undocumented (more precisely, fraudulently documented), involving an alleged entity that uncharacteristically had no documentary evidence for its existence. This understandably placed them at some disadvantage in explaining their actions. But religious leaders, no less than the average taxpayer, must

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[21] The court also instructed the jury that "the lack of a formal corporation does not prevent a religious movement from being the beneficial owner of property held in the name of another" (Pet. App. 68 n.3).

assume the risk when they engage in undocumented transactions that the jury may not believe their account of the events. See *United States* v. *Garguilo*, 554 F.2d 59, 62 (2d Cir. 1977). To look at the quality of a taxpayer's proof hardly violates the First Amendment.

The jury instruction in question simply set forth commonsense, objective factors that the jury could rationally consider in determining whether the alleged international Unification Church Movement existed as an entity (as the defendants contended and the government contested at trial), and whether the assets in question were held for it in trust. Evidence that the Unification Church ordinarily incorporated its entities and maintained bank accounts in the institutional name, and that there were other Church entities that, in the ordinary course of Unification Church affairs, would be expected to hold Church funds, was obviously probative evidence.

Petitioners claim (Pet. 19, quoting the dissenting opinion, Pet. App. 70) that the jury instructions "freed the jury 'to find against Moon on the issue of beneficial ownership without even considering the crucial issue of donors' intent.'" But the court expressly instructed the jury that it "*should* consider all of the evidence, *including* such factors as * * * the intent of the parties who caused the stock and funds to be transferred to Reverend Moon's name" (Pet. App. 63 n.3 (emphasis added)). The instruction went on to emphasize that [w]hether a trust is created depends on the intent of the person giving the property at the time of the transfer," and to explain how that intent could be manifested (*ibid.*). The jury was thus clearly instructed that it should consider donors' intent (if any could be discerned). Petitioners' claim, as stated, thus has no basis in fact.

Perhaps petitioners mean to argue that the instruction on donors' intent, while correct, was not sufficiently prominent. But this amounts to no more than fine-tuning a trial judge's instructions. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). It certainly raises no First Amendment issue.

Petitioners' complaint that the trial court made "no reference at all to Reverend Moon's religious ministry"

(Pet. 20)—and indeed "fully filtered out religion" (*ibid.*) —is the most curious of all. To be sure, the trial court and the government were scrupulous in ensuring that petitioners' religion would not be an issue in the case—either for them or against them.[22] The jury was more than amply informed of petitioner Moon's relationship to the Unification Church—the whole case turned on it—but irrelevant and potentially inflammatory religious concepts were properly excluded from the case, as petitioners repeatedly requested at the time (see Tr. 2544, 2548-2550, 5117, 5720; see S. 24). This was consistent with the "neutral principles" approach of *Jones* v. *Wolf*, 443 U.S. 595 (1979).[23] Further discussion of why petitioner Moon's religious status might "explain[] why donations to the church would logically be placed in his name" (Pet. 20 n.34) would not be an issue of law to be explained by the judge, but an avenue of argument for the defense.

3. Petitioners contend (Pet. 23-29) that the "theory of federal tax liability" in this case, as reflected in the trial court's instructions to the jury on the law of the formation of charitable trusts, was so "novel and debatable" that its application in a criminal prosecution violated due

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[22] The court's statement to the jury that "considerations of [race or] religion must have no part in your deliberations" (Tr. 6538, quoted at Pet. 20 (material in brackets deleted)) was a standard admonition against racial or religious bias. Petitioners did not object to it at trial, and we find it incredible that they find fault with it now.

[23] Petitioners disagree (Pet. 18-19) with the court of appeals' conclusion (Pet. App. 31) that *Jones* v. *Wolf*, *supra*, was not directly pertinent here. This case does not involve competing claims to control of property that is established as belonging to a church. Rather, it involves whether certain income-producing property is owned, for federal tax purposes, by an individual. See pages 28-29, *infra*. But even assuming *Jones* applies in this somewhat different context, there plainly was nothing in the district court's instructions that violated the "neutral principles" approach of *Jones*. The instructions simply referred to "objective, well-established concepts of trust and property law" with no need for "inquiry into religious doctrine" (443 U.S. at 603).

process. Petitioners do not ask this Court to decide whether the jury instruction on trust law was erroneous. For purposes of evaluating this contention, therefore, this Court may assume the instruction was legally correct.[24] Nor do petitioners challenge the jury's factual conclusion that petitioners prepared and filed the disputed tax returns with full knowledge of their illegality. See Pet. App. 18-20. They also do not suggest that their false filings were predicated on any actual good faith reliance on prior precedent (cf. *United States* v. *Bishop*, 412 U.S. 346, 361 (1973), explaining *James* v. *United States*, 366 U.S. 213 (1961)) or mistake of law (cf. *United States* v. *Brown*, 411 F.2d 1134, 1137 (10th Cir. 1969)). Rather, they apparently contend that to prosecute them violated due process solely because of an asserted uncertainty in law that did not affect their conduct.

We would dismiss petitioners' theory as being plainly contrary to precedents of this Court (*e.g.*, *United States* v. *Bishop*, *supra*; *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337 (1952); *Screws* v. *United States*, 325 U.S. 91 (1945)), as well as common sense—as the court of appeals unanimously did[25]—were it not for *United States* v. *Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), petition for cert. pending, No. 83-1297.[26] In *Dahlstrom*, the Ninth Circuit held that the absence of a prior statute, regulation, or court decision directly establishing the illegality

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[24] Petitioners assert that the court of appeals' holding on the instruction "squarely conflicts with all relevant federal tax precedents" (Pet. 23). Nonetheless, they do not seek reversal of that holding; their sole complaint before this Court is that it was "novel and debatable" (Pet. i). Their position therefore must be that no conviction could be sustained on the basis of the instruction, even assuming it was correct.

[25] Dissenting Judge Oakes agreed with the implicit holding of the majority on this point, as he stated during oral argument. See Pet. 29 n.56. Petitioners' theory is inconsistent with Second Circuit precedent. *United States* v. *Ingredient Technology Corp.*, 698 F.2d 88 (1983), cert. denied, No. 82-1526 (June 20, 1983).

[26] Petitioners have been provided copies of the Petition in *Dahlstrom*.

of a tax evasion scheme precludes prosecution of the promoters, even where there is ample evidence of willfulness and no evidence that any lack of clarity in the law had an actual impact upon the promoters' actions. We believe the holding of *Dahlstrom* is clearly incorrect, as our petition for a writ of certiorari explains in detail. But even if the *Dahlstrom* decision were correct, petitioners' more extreme claim would still be without merit.[27] Petitioners have no basis for claiming legal uncertainty here, and the holding of *Dahlstrom* would not in any event stretch so far.

As an initial matter, we find it difficult to identify any significant difference between petitioners' legal position and the trust instruction. It seems to us that the instruction, taken as a whole, was substantially in accord with petitioners' theory of the law. Indeed, petitioners lodged no specific objection to the trust instruction when it was given. See note 16, *supra*. This casts considerable doubt on their claims of prejudice here, if they can raise the argument at all. See *Henderson* v. *Kibbe*, 431 U.S. at 154.

Petitioners point out (Pet. 23 (emphasis in original; footnote omitted)) that, once a trust is created, "use of a portion of the property for the recipient's personal purposes may make *that portion* taxable as his income," but that "the remainder * * * is not taxable to him." So did

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[27] The other decisions cited by petitioners (Pet. 27-29) neither create a conflict nor otherwise justify granting certiorari. *James* v. *United States*, 366 U.S. 213 (1961), has subsequently been explained by this Court as holding merely that "[t]he requirement of an offense committed 'willfully' is not met * * * if a taxpayer has relied in good faith on a prior decision of this Court." *United States* v. *Bishop*, 412 U.S. at 361. Similarly, in *United States* v. *Critzer*, 498 F.2d 1160 (4th Cir. 1974), the taxpayer relied in good faith on the advice of a government agency with responsibility for supervising her affairs. *United States* v. *Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc)—though wrongly decided, in our view—dealt with the right of a taxpayer to introduce expert evidence bearing on the asserted uncertainty of the law. The holdings of these cases have no bearing on the issue here.

the instruction.[28] Petitioners point out (Pet. 24-25 (footnote deleted)) that, to create a trust, there is no requirement that the donors "mentioned the word 'trust' or otherwise displayed a 'clear and unequivocal' intent to 'create a trust.'" So did the instruction.[29] Petitioners point out (Pet. 24-25) that the existence of a trust does not turn on "the recipient's freedom to make personal use of some portion of the property donated." The instruction was not to the contrary—so long as it is understood that, to be a trustee, the recipient must be under *some* legal constraint in his use of the funds.[30] In short,

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[28] "If a trust does exist and the trustee diverts trust property to his own use, the funds diverted become taxable to him at the time and to the extent so diverted" (Pet. App. 69 n.3).

[29] Whether a trust is created depends on the intent of the person giving the property at the time of the transfer, and that intent must be clear and unambiguous. A trust can be created orally or by the conduct of the parties. The trust need not be reflected in a written document.

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All that is required is that both parties to the relationship understand that the first person is holding the property for the benefit of the second, and you can find such an understanding on the basis of the party's conduct.

Pet. App. 68-69 n.3. The "clear and unambiguous" intent mentioned in the instruction is not, as petitioners apparently believe (Pet. 23-25), an intent to create a juristic entity known as a "trust," but—as the full instruction makes clear—intent that one party hold the property for the benefit of another. The court of appeals' imprecise reference to "evidence of intent to create a *trust*" (Pet. App. 24 (emphasis in original)) may be the source of petitioners' misunderstanding; but since the trial court's instruction was correctly worded, the court of appeals' dictum does not create an issue warranting review.

[30] In order for a trust to exist, the trustee must be obligated to use the property for the benefit of the beneficiaries; a gift with a mere request or expectation that the property would be used a particular way does not create a trust. There is no trust if the person who receives the money is free to use it for his own benefit.

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Also, the mere fact that Reverend Moon exercised control over the funds and the stock is not necessarily indicative of his

unlike in *Dahlstrom*, the uncertainty here is, at most, over minor variations in language of a jury instruction, such as might arise in any criminal trial. Petitioners have identified no uncertainty in the law that might cast doubt on the constitutionality of their convictions.[31]

Moreover, the instruction in question was in accord with settled principles of both New York trust law and federal tax law. In *Lefkowitz* v. *Cornell University*, 35 A.D.2d 166, 173, 316 N.Y.S.2d 264, 271 (1970), aff'd, 28 N.Y.2d 876, 271 N.E.2d 552, 322 N.Y.S.2d 717 (1971), property was given to a charitable organization, but the court concluded that no trust had been created (*id.* at 172-173):

> While a charitable trust may be created by a declaration of the owner of the property that he holds it upon a charitable trust (Restatements, Trusts 2d, § 349), no trust is created unless the donor mani-

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personal ownership. A person who holds property on behalf of another may be given broad authority and discretion to deal with that property as long as he does so in a manner consistent with the purpose for which he was given title to the property in the first place.

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A religious organization can properly pay the living expenses of [its] leaders or ministers in order to allow them to pursue its religious purposes and can make loans to its ministers or leaders on arm's length terms.

Pet. App. 69 n.3. There is, therefore, no conflict between the instructions and the holding in *Morey* v. *Riddell*, 205 F. Supp. 918 (S.D. Cal. 1962). See Pet. 25.

[31] Petitioners seek to magnify the importance of the issue by asserting (Pet. 25) that "[h]ad the settled rule been applied in this case, none of the Chase interest—all of which was earned on funds donated 'to the church' * * * —would have been taxable income to Reverend Moon." They conveniently forget (see note 2, *supra*) that the jury was entitled to disbelieve their account of the origin of the funds—undermined, as it was, by their fabrication of documents—and that there was no credible evidence whatsoever that petitioner Moon intended to hold the funds on behalf of the Church. Given the evidence in this case, it is highly unlikely that minor alterations in the jury instructions would have resulted in a different verdict.

> fests an intent to impose enforceable duties. (Restatement, Trusts 2d, § 351.) While no particular words are required to create the trust, "the words and acts relied upon must be unequivocal in nature and admit of no other interpretation than that the property is held in trust". (*Matter of Fontanella*, 33 A.D.2d 29, 30.)

Accord, Restatement (Second) of the Law of Trusts § 351 (1959) ("A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust")[32]; *Cox* v. *Commissioner*, 297 F.2d 36 (2d Cir. 1961); *Estate of Barry* v. *Commissioner*, 34 T.C. 160 (1960).[33] The New York cases cited by the dissenting judge (Pet. App. 66), and relied on by petitioners (Pet. 25),[34] are not in point. In none of them was the intent to create a trust at issue. They stand for the well-established principle that courts should apply reasonable inferences to uphold charitable trusts where the requisite intent was manifested; they do not support petitioners' view that a trust may be found even in the absence of intent clearly manifested at the time the transfer of property is made.

Moreover, the question of "ownership" for purposes of federal tax law does not depend upon refinements of title under state trust law: the question is one of actual command over property and realization by the taxpayer of

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[32] See Restatement, *supra*, comment d: "If property is transferred to a person, with no restrictions upon his disposition of the property, a charitable trust is not created merely because the transferor states * * * that he is making the transfer from a motive of promoting charity. If the transferee is authorized to dispose of the property in any manner or to any person he may select, he takes the property for his own benefit."

[33] Special rules for political campaign contributions, relied on by petitioners (Pet. 24 & nn.42, 44, 45), do not apply to charitable or religious trusts. See *United States* v. *Scott*, 660 F.2d 1145, 1164 (7th Cir. 1981), cert. denied, 455 U.S. 907 (1982); Rev. Proc. 68-19, 1968-1 C.B. 810, 811.

[34] *In re Will of Price*, 264 A.D. 29, 32, 35 N.Y.S.2d 111, 114-115 (1942); *In re Durbrow*, 245 N.Y. 469, 474, 157 N.E. 747, 749 (1927); *In re Estate of Nurse*, 35 N.Y.2d 381, 388-389, 321 N.E.2d 537, 540, 362 N.Y.S.2d 441, 446 (1974).

economic value from the property. *Rutkin* v. *United States*, 343 U.S. 130, 136-137 (1952); *Burnet* v. *Wells*, 289 U.S. 670, 678 (1933); *Corliss* v. *Bowers*, 281 U.S. 376, 378 (1930); see 26 U.S.C. 678(a). For tax purposes, a person may even be deemed the owner of property to which he does not have a legal right. See *James* v. *United States*, 366 U.S. 213 (1961) (embezzled funds taxable); *Rutkin* v. *United States*, *supra* (extorted money held to be taxable income). Accordingly, if petitioner Moon had unfettered power to use the assets in question for his own personal benefit and enjoyment, even if he appropriated such power without consent of the putative donors, he was the "owner" of the assets for tax purposes.[35]

Therefore, even under the test in *Dahlstrom*, petitioners have not made out a colorable due process violation. Even the *Dahlstrom* court would permit criminal prosecution where, as here, a "court decision gave fair warning" (713 F.2d at 1429) of the law. But even assuming that petitioners have correctly identified a relevant uncertainty in the law, it would require a significant and unreasonable expansion of the principle of *Dahlstrom* to preclude prosecution here.

In *Dahlstrom* the legal uncertainty held to preclude prosecution purportedly related to the government's case in chief—*i.e.*, to whether the government's evidence supported a finding of a violation of the tax laws.[36] Here, in contrast, the government's case is simple and straightforward: all the evidence shows petitioner Moon owned the property; he paid no taxes on the interest or on the receipt of stock; therefore, he violated the law. There is absolutely no uncertainty about the proposition that if the property belonged to Moon personally, he was obliged

[35] This would not, of course, preclude prosecution of an errant trustee for embezzlement or diversion of trust funds. See Br. for State of Hawaii, et al., as amici curiae.

[36] As we explain in the Petition in *Dahlstrom* (at 19-22), we do not believe the court of appeals was correct in holding that the asserted legal uncertainty there was material to the government's case.

to pay income taxes on the income it reflected or produced. The supposed uncertainty in this case arises solely with respect to the defense proposition—supported by evidence so marginal that the court of appeals concluded that petitioners had not established a prima facie case on their theory (Pet. App. 23-25)—that the property was held in trust. Whatever the merits of the *Dahlstrom* principle with respect to pioneering government theories of liability, there is no merit in petitioners' view that a criminal defendant may not be prosecuted for a crime if his lawyers are clever enough to propound a theory for the defense that involves, as one of its elements, an unsettled proposition of law.

4. Quite apart from the correctness of the decision below, the Petition raises no issue of general importance warranting this Court's review. On the first issue—denial of bench trial—petitioners seek nothing short of invalidation of Rule 23(a) of the Federal Rules of Criminal Procedure and reversal of the principles established in *Singer* and applied, without deviation or apparent problem, in each of the small handful of circuit court decisions addressing the problem since *Singer*. And on the second and third issues, petitioners seek a detailed reexamination of the nuances of a jury instruction essentially unique to this case. Such an examination has already been performed by the court of appeals in a lengthy and painstaking opinion. We well recognize that the prominence of petitioner Moon has attracted unusual attention to this case; the legal issues raised, however, are of little significance beyond these unusual circumstances,[37] and were dealt with fully and responsibly by the courts below.

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[37] This prosecution for willful violations of the tax laws and related offenses was precipitated and the proof largely supported by petitioners' massive and undisputed effort to deceive the tax authorities by document fabrications, false explanations, and perjury. Contrary to the fears expressed by the numerous religious individuals and groups appearing as amici curiae (none of whom manifests an awareness of the evidence that supported conviction of petitioners), informal financial arrangements maintained by churches in good faith are not in jeopardy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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